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STATE JURISDICTION TO IMPOSE TAXES

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THE power of our states to impose taxes is either expressly or impliedly limited by various provisions of the Constitution of the United States. The restrictions on the power derived from the federal commerce clause and from the principle that it may not be so used as to interfere with the functioning of the federal government or its agencies and instrumentalities have furnished the occasion for numerous judicial decisions. The discussion that follows will, however, confine itself to considering the theory that a state can reach those taxables only that are within its territorial boundaries. This jurisdictional problem has now become in form one of construing that provision of the Fourteenth Amendment to the federal Constitution which prohibits states from depriving a person of property without due process of law. That clause limits a state's taxing jurisdiction regardless of the kind of tax it seeks to impose. It is the judicial gloss on that text, particularly in its bearing on the problem of multi-state property and inheritance taxes, that furnishes the materials for the discussion.

The formal concept that has played an important rôle in the discussions of a state's jurisdiction to impose property and inheritance taxes is that of situs. This elusive concept in reality denotes the end term of a process of legal reasoning, which in turn constitutes the legal basis for the further legal conclusion that a state has the requisite jurisdiction to tax property or its transfer.¹ The emphasis

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1. See the remarks of Mr. Justice Stone in his dissenting opinion in *First National Bank of Boston v. Maine*, 284 U. S. 312, 331 (1932). This case will be hereinafter sometimes referred to as the *Boston Bank Stock Case*. It and *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204 (1930); *Baldwin v.*

on situs has at times obscured the more important factors operative in developing judicial theories as to the constitutional limits on a state's taxing power. It is, however, these factors rather than the formal concept of situs that give such guidance as can be derived from decided cases as to the probable course of future decisions in this field. There are some situations in which the judgment that property has a taxable situs within a given state is readily correlated with rather easily established objective facts. The situs of tangible realty is a function of its physical location for the purpose of determining the state that can impose a property tax on it, and an inheritance tax on its transfer, although several state courts have employed the fiction of equitable conversion to permit its transfer to be in effect taxed by the state of the decedent's domicile.² A creditor's security interest in tangible realty has itself a taxable situs for purposes of property taxation in the state of the realty's physical location.³ The sole taxable situs of such an incorporeal right as a ferry franchise is in the state that has created it, a fact easy of ascertainment.⁴

It is not as easy to discover readily recognizable objective factors upon whose existence courts base their conclusions as to the taxable situs of tangible personalty. The state of its owner's domicile is entitled to assert what might be called a "residuary situs" even though the property in question has never been, and can never be, physically present within it, provided that such property has no situs elsewhere.⁵ This doctrine is intelligible only on the assumption that a situs of such property on the basis of the owner's domicile is constitutionally subordinate to a situs based on some other factors. The decisions make it clear that the permanent presence of tangible personalty in a non-domiciliary state establishes a situs for it there which the domiciliary state is required to recognize as depriving it of its taxing jurisdiction over such property.⁶ It is not wholly clear what degree of presence will suffice to give a non-domiciliary state

Missouri, 281 U. S. 586 (1930); and *Beidler v. South Carolina Tax Commission*, 282 U. S. 1 (1930); will hereinafter be frequently referred to as "the recent decisions" or "the recent inheritance tax decisions."

2. See *Land Title & Trust Co. v. Tax Commission*, 131 S. C. 192, 126 S. E. 189 (1925), which discusses the authorities for and against this view.

3. *Savings & Loan Society v. Multnomah County*, 169 U. S. 421 (1898), The federal Supreme Court has not yet decided this matter as it involves state inheritance taxes.

4. *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 385 (1903).

5. *Southern Pacific Co. v. Kentucky*, 222 U. S. 63 (1911).

6. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 (1905); *Frick v. Pennsylvania*, 268 U. S. 473 (1925).

power to tax such tangible personalty as ships, railroad rolling stock, and motor busses and trucks.⁷ The Supreme Court has permitted the non-domiciliary state to deal with such property by methods reasonably adapted for ascertaining the amount of capital invested in such equipment employed within it during the tax period involved.⁸ That state is not restricted to taxing the specific units of such equipment that can be shown to have acquired during the tax period in question whatever degree of physical presence is necessary as a basis for the conclusion that such specific units had their situs within such state during such tax period.

It has generally been the formulae employed for measuring the amount of such property within the non-domiciliary state that have been assailed as violating due process when this form of taxation has been employed.⁹ Various bases of allocation have been upheld under particular fact situations, but, as in the case of other applications of the unit rule, due process requires only that the allocation formulae do not produce arbitrary results.¹⁰ The due process clause in its application to the jurisdictional problem of the taxation of tangible personalty and its transfer has aimed to prevent the simultaneous multi-state taxation of such property or its transfer, but thus far has not been applied to prevent such multi-state taxation as might result from lack of uniformity among states in the selection of allocation formulae and their application.

The employment of the due process clause of the Fourteenth Amendment to eliminate the multi-state taxation of intangible personalty is of recent origin, but has already resulted in reversing constitutional doctrines of long standing. The decisions have thus far been rendered in cases involving state inheritance taxes. The principles invoked to reach these reversals of prior decisions, however, raise questions as to how much of the law governing the jurisdiction of states to impose property taxes on intangible personalty, established by decisions made prior to the development of these later doctrines, is still operative. The logical development of the implications of some of those principles involve changes that may effect considerable impairment of the ability of some states to raise the revenues required for their governmental operations. The important question is whether the Court is likely to carry through

7. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (1891); *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70 (1899). See Powell, *Taxation of Things in Transit* (1921) 7 VA. L. REV. 167, 245, 429, 497.

8. *Union Tank Line Co. v. Wright*, 249 U. S. 275 (1919).

9. See cases cited *supra* notes 7, 8.

10. See cases cited *supra* notes 7, 8.

those implications to their logical conclusion. The consideration of that question demands a resumé of the recent cases that have raised it, and an analysis of the reasoning by which the decisions in those cases were reached.

The case of *Farmers Loan & Trust Company v. Minnesota*¹¹ was the first to break with the earlier theory that due process did not prohibit multi-state taxation of the transfers of intangibles. That involved an inheritance tax imposed by Minnesota upon the transfer of bonds of that state and some of its political subdivisions that were owned by a person dying domiciled in New York. It would be difficult to conceive a case in which the taxing state's power over the debtor could be greater, and that factor had been held a sufficient jurisdictional basis for a non-domiciliary state's imposition of an inheritance tax in *Blackstone v. Miller*¹² more than a quarter of a century before *Farmers Loan & Trust Co. v. Minnesota* was decided. There had been during the intervening years no authoritative decisions involving inheritance taxes even intimating that a non-domiciliary state lacked power to impose such taxes on the transfer of intangible personalty. There had, on the contrary, been decisions adding to the factors on which such a state could base such a tax, the mere presence of notes for safe-keeping within it,¹³ and the fact that the property transferred consisted of shares of stock of a corporation incorporated within it.¹⁴ The régime of multi-state inheritance taxation of the transfer of intangibles had been recognized as constitutional in the case of *Frick v. Pennsylvania*,¹⁵ and attempts to reduce that evil by deducing from the due process clause a prohibition against the levy of an inheritance tax by the state of decedent's domicile on the transfer of bonds permanently held for safe-keeping in another state, on the theory that such bonds were tangibles within the principle against multi-state taxation of the transfer of tangibles, were defeated in *Blodgett v. Silberman*,¹⁶ decided about two years prior to *Farmers Loan & Trust Co. v. Minnesota*.

However, there soon appeared intimations that the desire to prevent multi-state taxation of intangibles was entering as a factor in the Supreme Court's consideration of the jurisdictional problem. *Safe*

11. *Supra* note 1. This case will be frequently referred to hereinafter as the Minnesota Bond Case.

12. 188 U. S. 189 (1903).

13. *Wheeler v. Sohmer*, 233 U. S. 434 (1914).

14. *Frick v. Pennsylvania*, *supra* note 6.

15. *Ibid.*

16. 277 U. S. 1 (1928).

*Deposit & Trust Co. v. Virginia*¹⁷ involved an attempt by Virginia to impose a property tax on stocks and bonds owned and kept in Maryland by a Maryland trust company under a deed of trust executed by a resident of Virginia for ultimate distribution to a person who resided in Virginia during the period for which the tax was imposed. The attempt was held to violate due process. The Court in its opinion, while discussing the application of the fiction *mobilia personam sequuntur*, stated:

"It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two states at the same instant and because of this to uphold a double and oppressive assessment."

The factor that thus received incidental recognition has since played a major part in unsettling established doctrines. Its importance for future developments is not yet capable of precise formulation because competing premises are still being strongly urged.

The reasoning of Mr. Justice McReynolds in *Farmers Loan & Trust Co. v. Minnesota* first formulated the case for what may now be called the theory that due process requires all states to recognize that there occurs but a single taxable transfer when intangible personalty passes from its deceased owner to his successors. The substantial factors that induced the majority of the Court to accept that view were that the contrary view found in the earlier cases had produced friction among the states and other generally harmful consequences. It was urged that the primitive conditions of the earlier period had passed away, that business was now being conducted on a national scale, and that a large part of the national wealth was invested in negotiable securities whose protection against discriminatory, unjust and oppressive taxation was a matter of the greatest moment. There is no evidence that this discriminatory, unjust and oppressive burden consisted in anything other than the multi-state taxation of the transfer of such securities under modern conditions of the distribution of capital and its ownership, which clearly have little regard to state lines. It was these considerations that dictated the view that the general reasons inhibiting the taxation of tangible personalty by more than one state applied "under present circumstances equally to intangibles."

The discussions in *Baldwin v. Missouri*¹⁸ and *Beidler v. South*

17. 280 U. S. 83 (1929).

18. *Supra* note 1.

Carolina Tax Commission,¹⁹ cases in which the principles of *Farmers Loan & Trust Co. v. Minnesota* were extended to inheritance taxes on notes present in the taxing state, some of them of local debtors and secured by local assets, and on credits evidenced by open accounts, add nothing to the theory of the prevailing opinion already discussed. The prevailing opinion in *First National Bank of Boston v. Maine*,²⁰ however, adduced several reasons additional to those found in the *Farmers Loan & Trust Co. Case*. It was therein decided that the state of the corporate domicile had no power to impose an inheritance tax on the transfer of corporate shares owned by a person dying domiciled in another state, even though it credited against the tax claimed by it the inheritance paid to the state of decedent's domicile on the transfer of such shares. The power to impose such tax was, under the facts of that case, held restricted to the decedent's domiciliary state. This was a complete reversal of a position taken in *Frick v. Pennsylvania*,²¹ in which the claim of the state of the corporate domicile had been held superior to that of the state of decedent's domicile to such an extent that the latter was required to reduce the value of the shares on which the tax was based by the amount of the tax paid on their transfer to the state of the corporate domicile. The new reasons urged in this opinion deserve more than passing comment.

It is stated at the outset that the principle of immunity from multi-state taxation developed in the prior decisions was broader than the applications thereof made in those cases, and that, as applied to death taxes, it rested for its justification

"upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time."

The opposite view is said to involve a physical impossibility as applied to tangible property, and "an inherent and logical self-contradiction" as applied to intangible property. These views are reinforced by the statement that:

"Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there."

19. *Supra* note 1.

20. *Supra* note 1.

21. *Supra* note 6.

This reasoning would have greater cogency were it not for the fact that the transfer of property and the idea of situs denote legal conceptions whose content is not necessarily limited by physical factors or the requirements of logical consistency. There may be sound reasons why the law should, for tax purposes, treat the transfer of a tangible as occurring only at the place where such tangible has its physical location, but that it does not involve a physical impossibility to treat it as occurring elsewhere can be easily demonstrated.

It has, for example, been held in *Southern Pacific Co. v. Kentucky*²² that the state of the owner's domicile could tax ships that never had been, and never could be, physically within that state. There is no doubt but that the same state would be permitted to impose an inheritance tax on their transfer on the death of their owner were such owner a natural person dying domiciled in that state instead of a corporation organized under its laws. The same would be true of any tangible personalty whose physical presence outside the domiciliary state was insufficient to give it a situs outside such state. Similarly there may be sound reasons for confining to a single state, generally that of decedent's domicile, the power to tax the transfer of intangible personalty, but the logical difficulty said to be implied in the contrary view is scarcely one of them since that exists only if the conclusion itself be taken as the premise whose logically consistent implicates are to be developed. The opinion itself adverts to the more substantial reasons that lend support to this position which had already been stated in *Farmers Loan & Trust Co. v. Minnesota*. It adds the further reason that it would be anomalous and grossly unfair to permit the transfer of tangibles to be taxed in but one state while permitting the transfer of intangibles, which are "quite as much within the protecting reach of the Fourteenth Amendment," to be taxed by as many as four states.

It is clear from the foregoing resumé of the reasoning that has prevailed with the majority of the Supreme Court that the principles of the decisions just reviewed are likely to receive still further applications in the field of inheritance taxation, and may even come to be applied in the field of state property taxes on intangible personalty. The principal factor that renders it uncertain as to how far those theories will be carried is the reasoning in the concurring opinion of Mr. Justice Stone in *Farmers Loan & Trust Co. v. Minnesota*, and in the dissenting opinions in that case, in *Baldwin v. Missouri*, and in *First National Bank of Boston v. Maine*. Mr. Justice Holmes dissented in the first of these cases on the score that the laws of Minnesota were necessary to the continued existence

22. *Supra* note 5.

of the obligation of the bonds so that its assistance was necessary to acquire a right, and that it could demand a *quid pro quo* therefor, an argument adequately answered by Mr. Justice Stone in his concurring opinion in that case.

Mr. Justice Holmes' dissent in *Baldwin v. Missouri* directs attention to more fundamental factors. It is predicated on the protection the assets in question received from Missouri, and on the desirability of allowing the states a high degree of freedom in shaping their tax policies. The views of Mr. Justice Stone are likely to prove more influential in shaping the Court's policy in this field despite the fact that they have thus far proved ineffectual to stay the reversal of earlier doctrines. His concurring opinion in the *Minnesota Bond Case* started from the premise that a state could impose a privilege tax, such as an inheritance tax, only if the privilege is enjoyed within it, and held the tax in question invalid because the transfer of the bonds was completely effected in, and controlled by the laws of, the decedent's domiciliary state. It did, however, adopt the position that a non-domiciliary state could tax if an act essential to a completed transfer, which ordinarily could be compelled only within it and in accordance with its laws, occurred within that state. It was the existence of this factor, predicated on the presence of the assets in Missouri and the fact that a transfer by delivery there made would have defeated a transfer made in the domiciliary state, that led him to dissent in *Baldwin v. Missouri*. It is certain that his dissent is directed at the theory that the due process clause prohibits multi-state inheritance taxation of intangibles, rather than at the preference accorded the domiciliary state under the circumstances present in *Baldwin v. Missouri*. His view is that the payment of a tax in two places on the same economic interest, with respect to which its owner has sought and secured the benefits of the laws in both, is not so oppressive and arbitrary as to violate due process. There is thus a correlation of the power to tax an economic interest or its transfer with benefits and protection accorded it by the taxing state and received by the owner as the result of his own voluntary acts.

The same correlation is referred to in his dissent in the *Boston Bank Stock Case*. His position seems to be that the due process clause should not be construed to deprive a state of power to tax unless it is unable in a practical sense to protect the taxed economic interest, a position similar to that taken by Mr. Justice Holmes in his dissent in *Safe Deposit & Trust Co. v. Virginia*.²³ The principle

23. *Supra* note 17.

to be deduced from the due process provision is, in his view, that there are certain situations in which a single economic interest bears such a legal relationship to different taxing jurisdictions as to justify its taxation by more than one of them. The presence of the assets in Missouri in charge of the agent of the decedent owner who died domiciled in Illinois can be taken as an instance of that type. An important factor that led to his dissent in the *Boston Bank Stock Case* was that the non-resident decedent had acquired rights and privileges with respect to a corporation created by Maine whose nature and extent were defined by its laws and which were so far subject to its control that his power to secure a complete transfer thereof was dependent upon them. The same dissenting opinion opposes to the argument that the multi-state inheritance taxation of intangible personalty has produced intolerable evils the counter-vailing consideration that there is no assurance that resort to the Fourteenth Amendment as an instrument of reform will not create more difficulties and injustices than it will remove. The force of this consideration is readily appreciated by those states that have seen their taxable resources curtailed by the recent decisions, and will be more fully felt by them if the implications of the reasoning that has prevailed are logically extended to property taxes on intangibles.

The extent to which the recent decisions have modified the prior distribution among the states of the power to tax the transfer of intangible personalty depends not only on the restriction of that power to a single state but also on the principles defining the state that is to be accorded that power. The state of the decedent's domicile has been preferred in all the decisions thus far rendered. This preference was based in the *Minnesota Bond Case* on the reasoning that prior decisions had determined that "in general intangibles may be properly taxed at the domicile of their owner," and in *Baldwin v. Missouri* on the ground that it was in that state that the credits passed under decedent's will. The first of these reasons is rather unconvincing since prior decisions had also held that the transfer of credits could be taxed elsewhere than at decedent's domicile, one of those decisions being expressly overruled. The reason assigned does not, therefore, explain why the one line of authorities was chosen rather than the other. The second of the above reasons is insufficient since it amounts to no more than a categorical statement of the legal conclusion itself. This problem has thus far received its fullest consideration in the *Boston Bank Stock Case*. The issue is formally solved by invoking and applying the fiction of *mobilia personam sequuntur*. Its application is supported by the argument that

"there is wanting, on the part of a state other than that of the domicile, any real taxable relationship to the event which is the subject of the tax."

The less formal considerations relied on are, however, that

"practical considerations of wisdom, convenience, and justice alike dictate the desirability of a uniform general rule confining the jurisdiction to impose death transfer taxes as to intangibles to the state of the domicile."

The fact that a large majority of the states had adopted that rule by reciprocal inheritance tax statutes is said to fortify those considerations, despite the fact that Mr. Justice Stone in his dissenting opinion deems that in general the only fair solution of the problem of multi-state inheritance taxes on intangibles. That the preference of the domiciliary state, may be subject to exceptions is quite probable. The opinion of Mr. Justice Sutherland in the *Boston Bank Stock Case* states:

"We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property."

That this reference at least includes intangibles that have acquired a business situs in a non-domiciliary state is certain since the case of intangibles with such a situs was specifically excluded from the decisions in the three earlier cases in this series of reversing decisions. The language in the *Minnesota Bond Case* on this point can easily be construed as intimating a preference for the state in which credits and other intangibles have acquired a business situs. There may also be other situations in which intangible personalty will be held to have acquired a "situs analogous to the actual situs of tangible personal property" so as to be taxable by a non-domiciliary state. The existing situation, however, is this: In every instance in which due process confines to a single state the power to impose an inheritance tax on the transfer of intangible personalty, the state of the decedent's domicile will be given that power unless the facts are such as to require an inference that the intangible has acquired in a non-domiciliary state a "situs analogous to the actual situs of tangible personal property," in which case such state alone will be given the power to tax its transfer. The decisions thus far give practically no aid for determining what fact or factors of policy will be deemed significant in deciding when an intangible has acquired the requisite "situs" in a non-domiciliary state.

The recent decisions of the Supreme Court thus far have decided that a state cannot impose an inheritance tax on the succession to

bonds, registered or otherwise, notes, bank deposits, and credits evidenced by open accounts, merely on the basis that the debtor is domiciled within it; that it cannot impose such tax merely because the bonds or notes "happen to be found" within it when their owner dies; that it cannot impose such tax even when the notes thus found within it are secured by mortgages on local realty; and that it cannot impose such tax on the succession to shares of corporate stock merely because the corporation is organized under its laws. Their reasoning requires the inference that in these instances the state of the decedent's domicile alone can impose the tax. *Blackstone v. Miller* and one of the rules of *Frick v. Pennsylvania* have been specifically overruled, and it is doubtful whether anything remains of the rule of *Wheeler v. Sohmer*,²⁴ which had permitted a non-domiciliary state to tax the transfer of notes on the sole basis of their presence for safekeeping within it. Doubts as to its present status arise because it has not been expressly overruled while certain language in *Baldwin v. Missouri* affords some slender basis for the position that that case does not cover securities permanently kept for safekeeping within a non-domiciliary state. The notes in the *Baldwin Case* are described as happening to be found in Missouri when their Illinois owner died. It is arguable that this could not be said of notes permanently within Missouri for safe-keeping. To include notes in the latter situation would tend to increase the evasion of such tax as the domiciliary state might seek to impose on their transfer through a judicious distribution of securities for safe-keeping in non-domiciliary states. The Court specifically stated that it was not necessary in the *Baldwin Case* to

"consider the possibility of establishing a situs in another state by one who should undertake to arrange for succession there and thus defeat the collection of death duties prescribed at his domicile."

It has, however, been stated that a non-domiciliary state did not acquire power to impose property taxes on notes that had been sent to a local agent of the owner for safe-keeping merely because they had been sent into the state to facilitate evasion of their taxation by another state;²⁵ but, on the other hand, the Court has on more than one occasion indicated that the jurisdictional limits deducible from the due process provision could be defined by taking into account the effect of a jurisdictional rule upon the problem of tax evasion.²⁶ The case of securities held for safe-keeping in

24. *Supra* note 13.

25. *Buck v. Beach*, 206 U. S. 392 (1907).

26. See *Union Refrigerator Transit Co. v. Kentucky*, *supra* note 6.

a non-domiciliary state might well be considered as involving an instance of a single economic interest bearing such legal relationships to two states as to permit their transfer to be taxed in both, but the strong current against multi-state transfer taxes is practically certain to prevent such result. If *Wheeler v. Sohmer* has been impliedly overruled, then only the state of the decedent's domicile will be permitted to impose the tax under the circumstances of that case. Only another decision specifically raising the problem can clarify the situation.

If it be assumed that it is still good law, the question arises whether the principle that a single state only shall be permitted to tax the transfer of intangibles will be applied so as to prohibit the domiciliary state from taxing the transfer. Do the facts of that case furnish an instance in which the owner can be deemed to have so used the securities in a state other than that of his domicile as to have given them therein a "situs analogous to the actual situs of tangible personal property"? Furthermore, would they acquire such a situs in a non-domiciliary state if they had been sent into it for safe-keeping as part of an arrangement to "defeat the collection of death duties prescribed at his domicile"? These are questions to which future decisions alone can give an authoritative answer. They suggest, however, that not all the considerations of wisdom and convenience justify the preference heretofore shown for the domiciliary state, and that there are substantial factors supporting Mr. Justice Stone's position in his dissent in the *Boston Bank Stock Case* that there is assurance that resort to the Fourteenth Amendment to deal with the problem of multi-state inheritance taxes will not create more difficulties than it will remove.

The exact present status of the taxation of the transfer of credits having a business situs in a non-domiciliary state cannot be definitely stated. Barring reversals of the present trend, it is certain that the taxation of their transfer will be confined to one state. The uncertainty exists only as to which state will be permitted to impose the tax, with present intimations rather favoring the state of the business situs. This is a valid recognition of that state's superior economic claim to deal with such credits as part of their owner's assets employed in business within it. The same considerations apply to a partner's interest in the partnership's business and assets, so that a deceased partner's interest should be localized for tax purposes where the business is conducted and the assets are employed. That is the economic fact, however much the legal issues may be complicated by questions as to the legal nature of a partner's interest in its business and assets.

The Supreme Court has, however, decided that where, under the

partnership agreement and the laws of the state in which the partnership's business and assets were located, the partner's interest is a right to receive his share of the partnership's net value, that share is intangible personalty having a situs for inheritance tax purposes at his domicile. Hence that state does not violate due process by taxing the transfer of a deceased resident's interest in a non-resident partnership.²⁷ There have been state decisions permitting the non-domiciliary state in which the partnership transacted its business to tax the transfer of a non-resident partner's interest therein.²⁸ If the Court should translate into law its intimations that the state in which credits have a business situs alone should be permitted to tax their transfer, it will be difficult to avoid extension of that theory to the transfer of a deceased partner's interest in the partnership's business and assets. There would be nothing oppressive in such a result, although it may involve difficulties and inconvenience in the case of partnerships operating in more than one state. Those difficulties might be overcome by allocating to each of such states a fair proportion of the unitary value of the whole of such deceased partner's interest in accordance with methods employed in connection with the imposition of property taxes on the corporate excess by non-domiciliary states.²⁹ It is quite true that this solution would not be as convenient as the method that localizes the transfer of such interest at the deceased partner's domicile. It is at least clear that the existing status of *Blodgett v. Silberman* is problematical.

The considerations above adduced for the case of a deceased partner's interest would seem to be equally applicable to the transfer of a seat on an exchange or board of trade. The Supreme Court has not yet passed on state inheritance taxation of this type of intangible, but its decisions sustain the imposition of property taxes thereon by both the state in which the exchange is located³⁰ and that of its owner's domicile.³¹ The taxation of the transfer of such property is quite likely to be confined to a single state, although it will in most cases involve a single economic interest with respect to which the owner is receiving the protection of both the aforementioned jurisdictions. Present indications are, however, that the theories of Mr. Justice Stone have not gained sufficient acceptance

27. *Blodgett v. Silberman*, *supra* note 16.

28. See *In re Henry*, 203 App. Div. 456, 197 N. Y. Supp. 63 (1st Dep't 1922), modified on another point, 237 N. Y. 204, 142 N. E. 586 (1923); *Small's Estate*, 151 Pa. 1, 25 Atl. 23 (1892).

29. See Isaacs, *The Unit Rule* (1926) 35 YALE L. J. 838.

30. *Rogers v. Hennepin County*, 240 U. S. 184 (1916).

31. *Citizens National Bank v. Durr*, 257 U. S. 99 (1921).

to warrant a belief that this problem will be solved by reference to them. If that be correct, then the question of deciding which of the two states shall be given the power to tax the transfer arises. It might be argued that this power should be awarded the state in which the exchange is located since it is there that the rights the seat confers are ultimately exerciseable.³² The case for the domiciliary state is, however, equally sound on economic grounds in every instance in which the rights and privileges conferred by the seat are employed in a brokerage business carried on in the domiciliary state. The net result is an uncertainty that only future decisions can resolve.

There are other situations on which the Supreme Court has not yet passed that require brief mention. The most important of these involves the problem of state inheritance taxation of the transfer of a decedent's beneficial interest in property held in trust. It has heretofore been held that the state of the decedent's domicile,³³ the state of the principal administration of the trust,³⁴ and that in which the trust realty had its situs,³⁵ can tax the transfer of such interest. In none of these decisions was the constitutional question specifically discussed, but their arguments purported to deal with the jurisdictional problem. These cases furnish instances of different states taxing a transfer on inconsistent theories within the meaning of that conception as thus far developed by the Supreme Court. The emphasis, in the *Boston Bank Stock Case*, on the theory that there is but a single transfer of a thing or interest that occurs at a decedent's death renders it almost certain that existing practices in this matter that have been countenanced by the decisions of state courts, will be held violative of due process.

The Minnesota supreme court, which had held in *Thorne v. State* that Minnesota could tax the transfer of certificates of beneficial interest in the Great Northern Ore Trust owned by a New York decedent on the basis that the trust's principal place of administration was in the state, has recently overruled that decision as to those certificates because it felt compelled to do so by the recent Supreme Court rulings. It took the position that those certificates were in substance like shares of corporate stock.³⁶ The Minnesota

32. See opinion of Mr. Justice Holmes in *Citizens National Bank v. Durr*, *supra* note 31, at 110.

33. *Dana v. Treasurer & Receiver General*, 227 Mass. 562, 116 N. E. 941 (1917).

34. *Thorne v. State*, 145 Minn. 412, 177 N. W. 638 (1920).

35. *Baker v. Commissioner of Corporations & Taxation*, 253 Mass. 130, 148 N. E. 593 (1925).

36. *In re Kennedy's Will*, 242 N. W. 697 (Minn. 1932).

court did not consider the alternative that the situation might come within the class in which the Supreme Court may ultimately hold a non-domiciliary state entitled to exercise the single right to tax the transfer. It was probably correct in deciding that the situation required the principle against multi-state taxation of the transfer of intangibles to be applied, and in holding that the state of decedent's domicile was the state having the sole power to impose the tax.

The formal factor on which a state's jurisdiction to impose an inheritance tax on the transfer of property has been made to depend is the situs of the property transferred. The jurisdiction of states to impose property taxes has also been defined in terms of the situs of the property. It is clear from the recent Supreme Court rulings that the significant factors in developing the law as to a state's power to tax the transfer of intangible personalty have been considerations of policy. Such factors, even before those rulings, had played a part in developing the implications of due process for the problem of a state's taxing jurisdiction. The desire to prevent multi-state property and inheritance taxes had played its part in developing the rule that a domiciliary state cannot, on the mere basis of that factor, tax tangible personalty with an "actual situs" elsewhere,³⁷ or tax its transfer under such circumstances.³⁸ Considerations based on countervailing policies, including the desire to prevent intangibles from evading taxes, had resulted in judicial approval of both multi-state property taxation and inheritance taxation of intangible personalty. These had been supplemented and reinforced by applying to this tax problem technical theories and premises that had been evolved for other purposes.

The recent decisions of the Supreme Court have practically relegated all other considerations to a position of insignificance in making the avoidance of multi-state taxation the dominant factor in dealing with a state's jurisdiction to impose inheritance taxes on the transfer of intangible personalty. The questions must be faced as to whether this change in position is likely to be carried over to the imposition of property taxes on intangible personalty, and what changes that would effect in the existing law. The Supreme Court has not as yet applied the principle to property taxes. The multi-state inheritance taxation of intangible personalty has now been prohibited with respect to the most important classes of such intangibles. The opinion of the Court in the *Minnesota Bond Case*,

37. *Supra* note 6.

38. *Frick v. Pennsylvania*, *supra* note 6.

after stating that tangibles having a permanent situs in a state, and their transfer, may be taxed only by the state where they are found, adds that

"the general reasons declared sufficient to inhibit taxation of them by two states apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction."

The same thought is repeated in the statement that

"we can find no sufficient reason for saying that they [intangibles] are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles."

This language is broad enough to include property as well as inheritance taxes. The probability that it does include property taxes is enhanced when the reasons leading to the overruling of *Blackstone v. Miller* are considered. These were that multi-state inheritance taxation of intangibles tended to produce friction among the states and that its results had been bad. It was also stated in substance that that large portion of the country's wealth invested in negotiable securities was entitled to protection against discrimination and unjust and oppressive taxation. It would seem that the last of these considerations would apply to an even greater extent to an annually recurring tax such as the property tax than to an inheritance tax imposed at infrequent intervals. The crux of the evil and the reason for the threat to good relations among the states would seem to lie to no slight degree in the barrier that multi-state inheritance taxation opposed to the development of a capital market on a national scale. The practise may also have contributed to bad feeling among the states because differences in practises among the states produced grievances against states that sought to encourage the investment therein of out of state capital or to promote incorporation under their laws. But whatever specific evils the court may have had in mind, it seems that they would exist in aggravated form with respect to multi-state property taxation of intangibles. The reasoning of the prevailing opinion in the *Minnesota Bond Case*, therefore, points to the conclusion that due process also confines to a single state the power to impose property taxes on intangible personalty.

The prevailing opinion in the *Boston Bank Stock Case* repeated those parts of the opinion in the *Minnesota Bond Case* referred to in the preceding paragraph. It also stated that the rule of immunity from taxation by more than one state deducible from the case last mentioned, from *Baldwin v. Missouri*, and from *Beidler*

v. South Carolina Tax Commission, was broader than the applications thus far made of it. This is followed by the statement that:

"In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time."

This reasoning specifically excludes direct application to property taxes. It is, however, fairly arguable that, since it is intended to indicate the basis on which rests the application to inheritance taxes of a broader principle to which the court has just referred, it inferentially warrants the conclusion that the broader principle was intended to include another kind of tax, that is, the property tax. It is also arguable that, if transmission of an intangible from the dead to the living cannot occur in two states at one and the same time, neither can an intangible be owned by a person in two states at one and the same time. Furthermore, if, as this opinion states, it involves a logical self-contradiction to treat the transfer of an intangible as occurring in two or more states at one and the same instant, equally so would it seem to involve such logical contradiction to treat an intangible as being owned in two or more states at one and the same time. It is quite true that the reasoning of the opinion that is made the basis of this argument is rather unconvincing, and that this weakens the argument. That reasoning, however, furnishes a datum that can validly be employed in determining the probable future extension of the principle against multi-state taxation, and the foregoing argument lies well within the methodological range of analogical legal reasoning. The reasoning of the prevailing opinion in the *Boston Bank Stock Case* may, accordingly, be said to increase the probability that the trend against multi-state taxation of intangibles will be extended to property taxes.

The only case in which the Supreme Court has discussed the problem of multi-state property taxation of intangible personalty in a manner pertinent to the present inquiry is *Safe Deposit & Trust Co. v. Virginia*.³⁹ There had been numerous earlier cases in which the taxation of the same intangible by more than one state had been held valid on the theory that the due process clause of the Fourteenth Amendment did not prohibit double taxation in all instances. The decision in *Safe Deposit & Trust Co. v. Virginia* went no further

39. *Supra* note 17.

than to decide that a state other than that of the domicile of the holder of the legal title of an intangible cannot impose a property tax on that legal interest merely on the basis that the property had been transferred in trust to the present legal owner by a resident of the taxing state at the time of said transfer and that the ultimate beneficiaries reside in that state. The reasoning of the prevailing opinion is none too clear, but there appears near its close language indicating that the Justices who agreed with that opinion viewed the case as one in which Virginia was attempting to deduce its power from the maxim *mobilia personam sequuntur*, and that they refused to permit this because it would involve the perversion of a maxim invented to prevent personalty from escaping taxation by employing it to support

"the irrational view that the same securities were within two states at the same instant and because of this to uphold a double and oppressive assessment."

This position furnishes a strong argument for the view that the court deems that the principle against the multi-state taxation of intangibles extends to property taxes. The decision itself does not require that conclusion. It only denies that certain factors constitute a sufficient basis on which a non-domiciliary state can predicate a power to tax the legal title to intangibles held in trust, as an earlier decision had denied such a state the power to tax such interest in trust property on the sole basis of the residence of the *cestui* within it.⁴⁰ The trust property included shares of stock which under existing decisions can be subjected to property taxes by the state of the legal owners domicile⁴¹ and that of the corporate domicile.⁴² The case does not decide that those stocks might not be validly taxed by both those jurisdictions. The same remarks would apply with respect to any other trust assets that under existing decisions can still be taxed by more than one state. Part of the reasoning in *Safe Deposit & Trust Co. v. Virginia* can be construed as favoring the theory that multi-state property taxation of intangibles violates due process, but the decision itself can by no means be so construed.

The foregoing comprises the case for the view last referred to. The theory of Mr. Justice Stone that a single economic interest may bear such legal relations to more than one state as to justify its taxation by all of them has thus far had no effect on the course

40. *Brooke v. Norfolk*, 277 U. S. 27 (1928).

41. *Hawley v. Malden*, 232 U. S. 1 (1914).

42. *Corry v. Baltimore*, 196 U. S. 466 (1905).

of decisions involving inheritance taxes. The same is true of his theory that any state that has accorded protection to an economic interest ought to be allowed to tax it if its owner has sought that protection. These views do, however, direct attention to considerations that assume added importance when applied to property taxes which might be viewed as annual payments for such protection. This factor might be sufficient to turn the scales against extending to property taxes the logical implications of some of the reasoning that has thus far prevailed in respect of inheritance taxes. There is also the consideration, referred to by Mr. Justice Holmes in his dissent in *Baldwin v. Missouri*, that the due process clause is in danger of being extended so as to interfere unduly with the state's taxing powers. This implied plea for a recognition of a state's interest in maintaining considerable freedom in shaping its tax policies stresses a factor that has failed to receive the consideration it merits in the prevailing opinions in the recent decisions. The effects of extending their doctrines to property taxes would be more serious in so far as such taxes are annually recurring charges whereas an inheritance tax is levied only occasionally. This factor, in a sense, balances the consideration already referred to that the evils that the recent decisions were intended to obviate would be present to a greater extent under a system of multi-state property taxes.

Income taxes also involve annual charges. Multi-state income taxes would seem to be at least as great an evil as multi-state inheritance taxes. It has, however, been repeatedly decided that a state other than that of the domicile of the recipient of the income does not violate due process by taxing a non-resident's income derived from sources within the taxing state.⁴³ The first case in which the Supreme Court passed on the power of the domiciliary state to impose an income tax was *Maguire v. Trefry*.⁴⁴ This sustained the power of such state to tax the income received by a resident beneficiary from a trust established and administered in another state. The opinion leaves it doubtful whether the tax was treated as one on the person, measured by income from sources outside of the state, or as on income from property, the *cestui's* equitable interest, having its situs in the taxing state. The domiciliary state's power to tax a resident on income derived from business wholly conducted in another state has been recently sustained against the claim that

43. *Shaffer v. Carter*, 252 U. S. 37 (1920); *Travis v. Yale & Towne Co.*, 252 U. S. 60 (1920).

44. 253 U. S. 12 (1920).

this deprived the taxpayer of property without due process of law.⁴⁵ There is no reason for assuming that the Court intended to overrule its prior decisions under which the non-domiciliary state in which this income was earned could also have taxed it. Multi-state taxation of income from business sources is, therefore, constitutionally possible, but whether the same is true as to income from property sources has not yet been authoritatively determined. The significance of this case for present purposes is that it may indicate a present intention on the Court's part to restrict the prohibition against multi-state taxation to inheritance taxes. It is also important because it bases the domiciliary state's power squarely

"upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received."

If such considerations justify a domiciliary state in taxing income from out-of-state sources concurrently with the taxation of the same income by the state in which it has its source, it would seem to be equally reasonable to permit a domiciliary state to impose a property tax on an intangible even though it were also taxable in some other state, provided only that some reasonable basis could be found for the latter imposition. The fact that the economic interest represented by the intangible received some benefits and protection from the non-domiciliary state is clearly at the basis of permitting a state to tax credits with a business situs therein on that basis. But there are other intangibles that receive a marked degree of protection from a non-domiciliary state which it would seem logical to permit such state to tax. Furthermore, the evils of the multi-state taxation of income would seem to be at least as great as those involved in multi-state property taxation of intangibles. If, then, the evils of the multi-state taxation of income do not require the due process clause to be so construed as to prohibit it, neither should that be invoked to eliminate the similar evils of the multi-state property taxation of intangible personalty. The resulting restriction of the prohibition of multi-state taxation of intangibles to inheritance taxation may well strike one as somewhat illogical and unreasonable since the evils of such system seem less in the case of inheritance than in the case of property taxes.

45. *Lawrence v. State Tax Commission of Mississippi*, 286 U. S. 276 (1932). See on state jurisdiction to impose taxes on income, Day, *The Taxable Situs of Income* (1922) 8 CORN. L. Q. 36; Kessler, *Some Legal Problems in State Personal Income Taxation* (1925) 34 YALE L. J. 759, 863; Rottschaefer, *State Jurisdiction of Income for Tax Purposes* (1931) 44 HARV. L. REV. 1075.

It would be somewhat hazardous to predict the Court's ultimate answer to the question whether multi-state property taxation of intangible personalty is in all cases prohibited by the due process clause. The best that can presently be done is to indicate the changes in law that will occur if the prohibition against multi-state taxation is thus extended, and to weigh the probabilities as to its extension to specific types of intangibles.

The existing rule that a non-domiciliary state is prevented by the federal Constitution from taxing a bond or credit on the sole basis of the residence of the debtor within it is certain to remain unaffected.⁴⁶ The theory that due process prevents a state from taxing credits on the sole basis of the presence within it of the instruments evidencing the credit, announced in *Buck v. Beach*,⁴⁷ is not likely to be abandoned, and is practically certain to be extended to bonds when the case arises. The recent inheritance tax decisions have merely strengthened the holdings under which the state of the owner's domicile is permitted to tax bonds and credits,⁴⁸ shares of corporate stock,⁴⁹ and seats on exchanges,⁵⁰ with the possible exception of the cases in which such credits have acquired a business situs in another state or such intangibles have been so used in another state "as to give them a situs analogous to the actual situs of tangible personal property." If multi-state property taxes on intangible personalty should ever be prohibited and the prohibition extended to intangibles with a business situs or a situs "analogous to the actual situs of tangible personal property" in a non-domiciliary state, the intimated preference for the latter state, implied in the opinions in the inheritance tax cases, is almost certain to be carried over to property taxes.⁵¹ The state of the corporate domicile can also tax corporate shares owned by non-residents,⁵² and it has been held that due process is not violated when the state in which an exchange is located taxes the seats owned by non-

46. *Case of the State Tax on Foreign Held Bonds*, 15 Wall. 300 (U. S. 1872); *Railroad Co. v. Jackson*, 7 Wall. 262 (U. S. 1868).

47. *Supra* note 25.

48. *Kirtland v. Hotchkiss*, 100 U. S. 491 (1879); *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54 (1917).

49. *Hawley v. Malden*, *supra* note 41.

50. *Citizens National Bank v. Durr*, *supra* note 31.

51. That such state can now tax credits on the basis of their business situs within it, see *New Orleans v. Stempel*, 175 U. S. 309 (1899); *Bristol v. Washington County*, 177 U. S. 133 (1900). See *Powell, The Business Situs of Credits* (1922) 28 W. VA. L. Q. 89.

52. *Corry v. Baltimore*, *supra* note 42.

residents.⁵³ These intangibles are accordingly subject to multi-state property taxation.

The economic interests represented by the share or the seat on the exchange clearly derive continuing benefits and protection of considerable importance from the state of the corporate domicile or that in which the exchange is located.⁵⁴ That would seem to justify construing due process in such a manner as to permit them to impose property taxes thereon. Nor does it seem unfair for the states in which the owners of such property are domiciled to include it in measuring the tax due it from such owners, in view of the fact that its ultimate benefits are quite likely to be there enjoyed. The economic interest represented by such property may not unreasonably be said to bear some continuing legal relation to the domiciliary state. That state's power to impose property taxes on intangible personalty has at times been justified as a valid measure of the advantages conferred by it, and hence of the owner's duty to pay it taxes.⁵⁵ Nothing in the inheritance tax decisions has impaired the force of this consideration as applied to property taxes, and its validity would seem to be quite independent of the tax treatment accorded such intangibles by another state. Cogent legal and economic reasons thus exist for continuing the existing régime of multi-state property taxes on these intangibles.

If, however, due process is held to require its abandonment, the theory urged by Mr. Justice Holmes in *Citizens National Bank v. Durr*,⁵⁶ that the rights and privileges conferred by an exchange seat might well be localized where the exchange is situated, might well be employed to confine its taxation to that state. The state of the owner's domicile is likely to be preferred to that of the corporate domicile if one only should be held constitutionally entitled to tax corporate shares. If the taxation of credits with a business situs in a non-domiciliary state is restricted to one state, that state is practically certain to be given the power. There are good reasons for dealing in the same manner with a partner's interest in the partnership's business and assets.

The conduct of business employing tangibles frequently produces an intangible variously described as good-will, franchise value, or

53. *Rogers v. Hennepin County*, *supra* note 30.

54. See opinion of Mr. Justice Holmes in *Citizens National Bank v. Durr*, *supra* note 31, at 110, and the dissenting opinion of Mr. Justice Stone in *First National Bank of Boston v. Maine*, *supra* note 1.

55. See *Fidelity & C. Trust Co. v. Louisville*, *supra* note 48; *Lawrence v. State Tax Commission of Mississippi*, *supra* note 45.

56. *Supra* note 31.

corporate excess. The state of the corporate domicile has been permitted to tax the whole of that intangible even where all the income producing tangibles and business were outside it, and this was held not to violate due process.⁵⁷ The non-domiciliary states in which the business is conducted do not violate due process by taxing a part of that intangible value determinable by the employment of the "unit rule" system.⁵⁸ This is another instance in which existing decisions permit multi-state taxation of an intangible. It was the desire to avoid that very result by localizing the intangible at the owner's domicile that produced the dissents in the early cases establishing this system. The mere fact that it was established in the very face of the contention that it would produce double taxation will probably be ignored if the question of extending the prevailing judicial hostility to multi-state taxation to this situation ever arises.

If the principle against such taxation is applied to this system, it will be rather difficult to determine which state shall be permitted to tax. The taxpayer's convenience would be best served by localizing this intangible at the corporate domicile. That would, however, ignore the superior economic claims of the states in which are located the property and business to which it owes its existence. To exclude that claim merely to prefer the one of a state having no other basis for its claim than the fact that the corporation was chartered by it, ignores economic realities, even if one allows for the consideration that the state may have been selected for incorporation in order to secure some economic advantage for the corporation or its stockholders. If the preference should be accorded the non-domiciliary states, due process will probably not be construed to require that the methods for determining the unit value, and the allocation formulæ of the various states entitled to tax a part of the corporate excess, be so related as to wholly avoid duplication of values. The only practical method for insuring that result would be to have identical methods and formulæ in all such states, and to use only factors objectively determinable so as to avoid possible duplication of values resulting in the course of administering the laws. This would involve judicial action that is not likely to be deduced from the due process clause.

57. *Cream of Wheat Co. v. County of Grand Forks*, 253 U. S. 325 (1920).

58. *Adams Express Co. v. Ohio*, 166 U. S. 185 (1897); *Adams Express Co. v. Kentucky*, 166 U. S. 171 (1897); *Fargo v. Hart*, 193 U. S. 490 (1904); *Southern Ry. Co. v. Kentucky*, 274 U. S. 76 (1927).

The cases that have thus far been considered have all dealt with situations involving a single legal interest representing any given person's distributive share in a single economic interest. The decisions in the inheritance tax cases prohibit the localization of such interest in more than one state for inheritance tax purposes even when that interest belongs to the legal category of intangible personal property. Our legal system, however, recognizes many situations in which a single economic interest is treated as supporting a series of legally recognized interests therein. The ultimate economic interest supporting a mortgagor's and mortgagee's legal interest in mortgaged realty is identical to the extent of the amount of the loan secured by the mortgage. That loan represents a liability of the mortgagor that reduces his net wealth by the amount thereof. The social wealth has not been increased by the mere fact that the lender has transferred a part of his own assets to the borrower in return for a promise of future repayment and a contingent claim on certain of the borrower's assets. The taxation of the realty at its full value to the mortgagor and the simultaneous taxing of the secured credit to the mortgagee involves a type of double taxation that is clearly permissible whether both taxes be imposed by the same or different states.⁵⁹

The same multiple taxation occurs when the corporate assets are taxed to the corporation simultaneously with the taxation of the corporate shares by the same or another state, but this too has never been deemed prohibited by due process. The same duplication of taxable wealth, through the recognition of different legal interests in the same ultimate economic value, occurs whenever the trustee and the *cestui* are treated as having separate taxable interests in the same assets held in trust. It has been held that due process is not violated by a tax imposed on the trust *res* by the state of the trustee's domicile.⁶⁰ The trust *res* in that case consisted of intangible personalty. The problem of whether any other state could, consistently with due process, impose property taxes thereon is the same as though the property were not held in trust. That the state of the *cestui's* domicile cannot on that basis alone tax the trustee's legal interest is established by *Brooke v. Norfolk*.⁶¹ That that factor, coupled with the fact that the property was transferred to a foreign trustee by a resident settlor, whose entire interest had ceased at the time the tax was imposed, will not support the tax on

59. This seems a fair inference from *Paddell v. New York*, 211 U. S. 446 (1908).

60. *Welch v. Boston*, 221 Mass. 155, 109 N. E. 174 (1915).

61. *Supra* note 40.

the trustee's legal interest is clear from *Safe Deposit & Trust Co. v. Virginia*.⁶²

Whether the state of the settlor's domicile may validly impose a tax on the legal interest in intangible personalty of a non-resident trustee during the time when the settlor retains a beneficial or other power to revoke the transfer has not yet been authoritatively determined,⁶³ and the same is true with respect to the question of what effect permitting such state to tax under such circumstances would have on the power of the state of the trustee's domicile to tax the interest at the same time. It is certain that the power to tax a trust *res* consisting of realty or tangible personalty having an "actual situs" in a state other than that of the trustee's domicile would be restricted to the state in which such realty was situated or such tangible personalty had its "actual situs" the same as if the like property were not held in trust.

It has, however, also been held that due process permits the state of the *cestui's* domicile to impose a property tax on his interest even though the trust was created under the will of a non-resident, the trustee is a non-resident, and the trust is being administered in another state.⁶⁴ That the Supreme Court would sustain this position is quite probable.⁶⁵ The question arises whether this equitable interest can validly be subjected to multi-state inheritance and property taxation. Reference has already been made to the fact that the Minnesota Supreme Court has construed the *cestui's* interest as intangible personalty on whose transfer the *cestui's* domicile alone can impose an inheritance tax.⁶⁶ The trust *res* in that case consisted of corporate shares. The trust *res* may, however, consist of tangible realty or tangible personalty having an "actual situs" in a state other than that of the *cestui's* domicile. There exist at present no data on which an answer can be given to the question whether the state in which the realty was located or in which such tangible personalty had an "actual situs" will be permitted to localize the *cestui's* interest therein for purposes of property taxation thereof or inheritance taxation of its transfer. Nor are there adequate data for hazarding an answer to the question

62. *Supra* note 17.

63. The state of decedent's domicile can validly impose an inheritance tax on the transfer of intangibles that decedent had transferred to a foreign trustee by a deed in which he reserved the power to revoke. *Bullen v. Wisconsin*, 240 U. S. 625 (1916).

64. *Hunt v. Perry*, 165 Mass. 287, 43 N. E. 103 (1896).

65. See *Safe Deposit & Trust Co. v. Virginia*, *supra* note 17.

66. *In re Kennedy's Will*, *supra* note 36.

whether due process will be construed to limit to a single state the imposition of such taxes in those situations.

The reasons for restricting to a single state the imposition of inheritance taxes on the transfer of a *cestui's* interest where the trust *res* consists of intangible personalty are equally applicable to cases in which the trust *res* consists of realty or tangible personalty. The Minnesota decision last referred to is quite likely to be followed on that point regardless of the character of the trust *res*. The determination of which state shall be allowed to exert that single taxing power is not as easy where the trust *res* is something other than intangible personalty. The problem of whether multi-state property taxation of a *cestui's* interest shall be permitted, and, if not, what state shall be allowed to tax it, is tied up with considerations already discussed when dealing with the probable extension to property taxes of the principles of the recent inheritance tax decisions. It is to be hoped that, if and when these questions come before our courts, the decisions will be worked out by reference to factors significant in tax matters rather than by invoking theories developed for dealing with quite distinct problems.

The prevailing opinion in *Baldwin v. Missouri* explicitly stated that that case did

"not involve the right of a state to tax either the interest which a mortgagee as such might have in lands lying therein, or the transfer of that interest."

The reservation of those issues probably means no more than that they are still open. If they are ever resolved by permitting taxation of the security interest or its transfer by the state in which the property comprising the security has its taxable situs, the benefits sought to be achieved by the recent inheritance tax decisions will be greatly limited unless the power of the state of the decedent's domicile is concurrently and correspondingly curtailed. The latter is quite improbable since the theory on which the state in which the security is situated will be permitted to tax, if it is allowed to do so, will involve no conflict with the principle localizing the credit at decedent's domicile. The result will be that the latter state will be permitted to tax the transfer of the credit while the former will be allowed to tax the concurrent transfer of the creditor's security interest. If the credit should be secured by a mortgage on property in more than one state, the argument would run in favor of all of them, at least so far as to permit each to tax the transfer of the security interest on the basis of an allocated

value, or, perhaps, even on a value equal to the value of the security within the state. The friction and annoyance incidental to such a system applied to corporate bonds make those against which the decision in the *Minnesota Bond Case* was aimed seem insignificant.

The fact that a non-resident decedent's credit was secured by realty in a non-domiciliary state has been held to draw the credit into the latter so that the taxation of its transfer by such state was deemed not violative of the federal constitution's prohibition against a state's taxation of things beyond its jurisdiction.⁶⁷ This decision can no longer, since *Baldwin v. Missouri*, be supported on that theory, but the result may still be obtainable if the transfer of the security interest should itself be held a valid and separate taxable subject. The uncertainty surrounding this matter also applies to inheritance taxation of the transfer of a resident vendor's interest in a land contract relating to realty in another state,⁶⁸ and of a non-resident vendor's interest under a land contract relating to realty within the taxing state.⁶⁹ These situations involve possibilities of multi-state taxation of the same economic interest although the result is effected through the treatment as taxable subjects of interests that have received separate legal recognition. In this respect these and the other situations considered in the last few paragraphs differ from those involved in the cases in which the multi-state inheritance taxation of intangibles has thus far been held to violate due process. Some of the reasons supporting those applications of due process would require that these situations receive similar treatment; others of those reasons have no application thereto. The extension of the prohibition of multi-state taxation to them is highly problematical.

The preceding discussion has not aimed to set forth the whole body of law governing the jurisdiction of states to impose property and inheritance taxes even on intangible personalty, but rather to indicate the probable extent to which the recent inheritance tax decisions have disturbed the existing system of law on that subject. The effect of those decisions has been as clearly favorable to the states in which exist large capital accumulations representing investments spread throughout the nation as they have been un-

67. *Kinney v. Treasurer & Receiver General*, 207 Mass. 368, 93 N. E. 586 (1911).

68. *State ex rel. Hilton v. Probate Court*, 145 Minn. 155, 176 N. W. 493 (1920). The constitutional issue is not specifically considered.

69. *In re Roger's Estate*, 149 Mich. 305, 112 N. W. 931 (1907). No constitutional point was considered.

favorable to the states in which those investments have been made. This may be a just result in view of the fact that those investments are frequently embodied in forms of property that are taxable by the latter class of states and which would not be there but for the capital accumulations owned in other states. Those decisions may be viewed as making the due process clause of the Fourteenth Amendment function to promote a freer capital market within the United States in a manner similar to that in which the commerce clause has promoted a vast free-trade area throughout it. The process might, if carried too far, restrict too severely the power of what might be called the debtor states to adjust their tax systems to their own views of proper tax policy, and it is arguable that the creditor states are sufficiently repaid through the flow to them of income from the investments made by their citizens in other states without being accorded a further advantage in respect of their taxing powers. These, at least, are some of the problems of policy with which the recent interpretations of due process are inextricably interwoven. There may be those who object to the intrusion of considerations of policy into the problem of developing the specific content of the due process provision, but this technique is unavoidable if the task is to be intelligently performed. It is to be hoped, therefore, that when the issue of extending the scope of the recent decisions arises, it will be approached and dealt with in the light of these factors rather than through the manipulation of legal theories developed for quite other problems.⁷⁰

70. The following articles discuss the problem of a state's jurisdiction to impose property and inheritance taxes; Beale, *Jurisdiction to Tax* (1919) 32 HARV. L. REV. 587; Carpenter, *Jurisdiction Over Debts for the Purpose of Administration, Garnishment and Taxation* (1918) 31 HARV. L. REV. 905; Nossaman, *The Fourteenth Amendment in its Relation to State Taxation* (1930) 18 CALIF. L. REV. 345; Chambers, *State Inheritance Tax on Foreign-Held Bonds or Notes Secured by a Mortgage on Land in the State* (1927) 12 CORN. L. Q. 172; Mason, *Jurisdiction for the Purpose of Imposing Inheritance Taxes* (1931) 29 MICH. L. REV. 324; Lowndes, *Tendencies in the Taxation of Intangibles*, (1930) 17 VA. L. REV. 146; Lowndes, *Basis of Jurisdiction in State Taxation of Inheritances and Property* (1931) 29 MICH. L. REV. 850; Lowndes, *The Passing of Situs—Jurisdiction to Tax Shares of Corporate Stock* (1932) 45 HARV. L. REV. 777; Powell, *Extraterritorial Inheritance Taxation* (1920) 20 COL. L. REV. 1, 283; Peppin, *The Power of the State to Tax Intangibles or Their Transfer* (1930) 18 CALIF. L. REV. 638; Rottschaefer, *The Power of the States to Tax Intangibles* (1931) 15 MINN. L. REV. 741.